No. 1154

In the Supreme Court of the United States

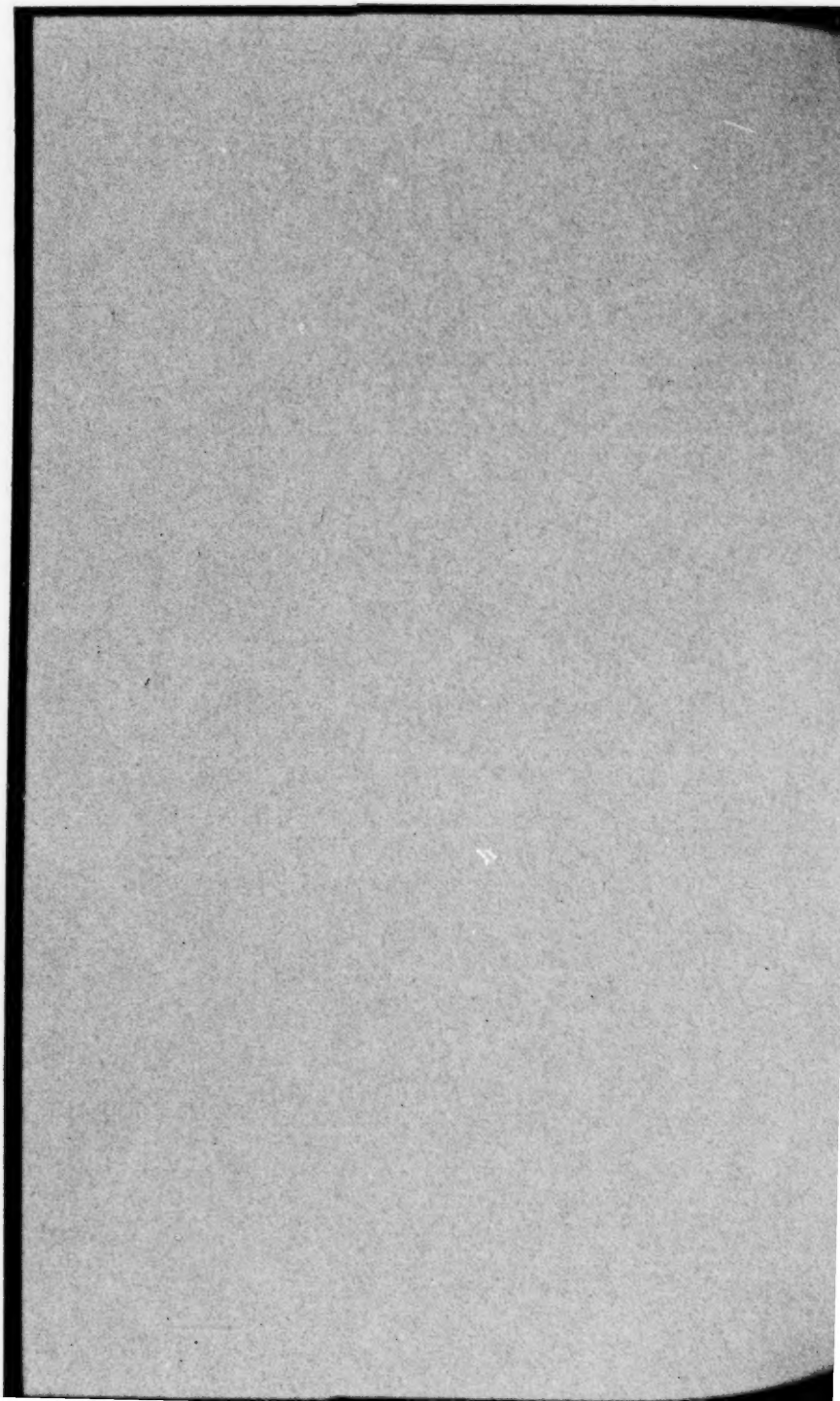
OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

MODERN REED AND RATTAN COMPANY, INC., AND ACHILLE GIANNASCA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT



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The Acting Solicitor General on behalf of the United States prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered January 8, 1947, reversing the convictions of respondents for violations of the Fair Labor Standards Act.

OPINION BELOW

The opinion of the circuit court of appeals (R. 442–445) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 8, 1947 (R. 445–446). A

petition for rehearing (R. 446–447) was denied January 24, 1947 (R. 448). On February 24, 1947, by order of Mr. Justice Jackson, the Government's time to file a petition for a writ of certiorari was extended to March 26, 1947 (R. 449). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

The Fair Labor Standards Act provides that violators may be imprisoned only after a prior conviction under the Act. The question presented is whether, on the trial of a second offender under the Fair Labor Standards Act, it was error to put before the jury the fact of the prior conviction and sentence for violation of the Act.

STATUTE INVOLVED

Sections 15 and 16 of the Fair Labor Standards Act of June 25, 1938, c. 676, 52 Stat. 1060, 1068 (29 U. S. C. 215, 216), provide in pertinent part as follows:

> SEC. 15. (a):
> * * * it shall be unlawful for any person—
> (1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in com-

merce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

* * * * *

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

* * * * *

STATEMENT

Respondents were convicted on 28 counts of an information returned against them in the United

States District Court for the Southern District of New York, charging violations of the Fair Labor Standards Act in that they (1) wilfully failed to pay time and one-half overtime wages to employees engaged in the manufacture of furniture to be shipped in interstate commerce, (2) wilfully shipped in interstate commerce furniture on which the employees thus denied overtime pay had worked, and (3) falsified records with respect to payment of wages to such employees (R. 5–42, 401–402). The corporation was fined $50 on each count, and the individual respondent was sentenced to imprisonment for three months and to pay a fine of $50 on each count, the prison sentences to run concurrently (R. 409).

The descriptive portion of the first count, which was incorporated by reference in the other counts, contained an allegation that respondents had pleaded guilty and had been sentenced under an information filed against them in 1941 charging failure to pay minimum statutory wages, shipment in interstate commerce of goods produced by employees not compensated in accordance with the requirements of the Act, and falsification of records (R. 7–8). In his opening statement, the United States Attorney stated that, as the trial judge had already told the jury, it was essential to the Government's case to prove the prior conviction, and that since this fact was a matter of official record, he did not believe there would be any dispute about it (R. 48). Defense counsel

did not object to this statement and himself referred to the prior conviction in his opening statement (R. 50). At the trial, the Government introduced the prior judgments of conviction without objection by defense counsel (Gov. Exs. 1 and 2, R. 53, 411–412). At the close of the evidence, the defense requested the court to instruct the jury to disregard the evidence of the prior offense in determining guilt or innocence (R. 386); the court accordingly instructed the jury as follows (R. 394):

> On the question of prior conviction of the defendant Giannasco and, I think, of the corporation, I charge you that in determining the fundamental issue of guilt or innocence in this case, you are not to put any weight upon that conviction. In determining the guilt or innocence of the defendants in this case you are not to say "He was convicted before, we will ignore the proof, he ought to be convicted now." You must rule it out when you are considering the fundamental issues in this case of whether or not the statute was wilfully and consciously and intentionally violated by these defendants.

On appeal, respondents for the first time contended that the references to their prior convictions at the trial below constituted prejudicial error. The circuit court of appeals upheld this contention and reversed the convictions (R. 443–445).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that, at a trial for a second offense under the Fair Labor Standards Act, it is error to bring before the jury the fact of the prior conviction.[1]

(2) In reversing the judgments of conviction.

REASONS FOR GRANTING THE WRIT

1. Until the decision of the court below, it has been considered an established rule that, where a statute provides greater punishment for a second offense, the indictment or information must allege the prior conviction, and the allegation must be supported by proof at the trial, unless a different mode of procedure is specifically prescribed by

[1] If certiorari is granted, the Government reserves the right, if so advised, to renew the contention urged in the circuit court of appeals that even if there was error a reversal should not have been directed under the circumstances of this case (see Statement, *supra*). Notwithstanding that objection was not made to the references in the information and at the trial to the prior convictions or to the proof thereof, that the jury was instructed not to consider the prior convictions on the question of guilt, and that the circuit court of appeals assumed that the Government could have proved Giannasca's prior conviction either to rebut evidence of his good character or to discredit him as a witness, the circuit court of appeals nevertheless held that the error was not waived and was substantial (R. 444–445). The court does not refer to the fact that Giannasca may have been forced to take the stand to escape conviction in view of De Pietro's testimony (see R. 443) rather than, as it suggested, because his freedom of choice had been taken away by the references to and the proof of his prior conviction.

statute. The text writers so state the rule;[2] this Court has given it recognition in dealing with problems arising out of state habitual criminal statutes;[3] numerous circuit courts of appeals so held in prosecutions arising under Title II, Section 29, of the National Prohibition Act (41 Stat. 316);[4] and many State decisions are to the same effect.[5] In fact, the rule was considered so well settled that in *Graham* v. *West Virginia,* 224 U. S. 616, this Court found it necessary to consider the propriety of a statute providing for a different method of proof of the prior offense. This Court there referred to the "familiar practice to set forth the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue together with that relating to the commission of the crime which the indictment charges." 224 U. S. at 625.

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[2] Bishop, *Criminal Law*, 9th ed., Vol. I, § 961; Wharton, *Criminal Law*, 7th ed., Vol. III, § 3417.

[3] *McDonald* v. *Massachusetts*, 180 U. S. 311, 313; *Graham* v. *West Virginia*, 224 U. S. 616, 625–626.

[4] *Jacobs* v. *United States*, 24 F. 2d 890, 891 (App. D. C.); *Klein* v. *United States*, 14 F. 2d 35, 36 (C. C. A. 1); *Singer* v. *United States*, 278 Fed. 415, 420 (C. C. A. 3), certiorari denied, 258 U. S. 620; *Doerning* v. *United States*, 49 F. 2d 44, 45 (C. C. A. 6); *McCarren* v. *United States*, 8 F. 2d 113, 114 C. C. A. 7); *Massey* v. *United States*, 281 Fed. 293, 297 (C. C. A. 8); *Smith* v. *United States*, 41 F. 2d 215, 216 (C. C. A. 9), certiorari denied, 282 U. S. 876.

[5] A number of the State decisions are cited in *Massey* v. *United States, supra;* see also cases collected in 58 A. L. R. 64, and 82 A. L. R. 366.

The decision below distinguishes the prohibition cases on the ground that Section 29 of the National Prohibition Act and its successors specifically provided that the prior conviction be pleaded in the indictment or information,[6] whereas the statute presently involved contains no such requirement. This difference between the two statutes would not seem to offer a sound basis for distinction. A defendant who is charged with being a second offender ought to be informed of that fact, whether the statute so provides or not, in order that he may be able to contest the fact of a prior conviction. See *McDonald* v. *Massachusetts,* 180 U. S. 311, 313, where this Court said: "The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute * * *." And if the fact that a defendant must be informed of the prior conviction requires proof of such fact at the trial, as the Prohibition Act cases hold, then the same reasoning would require proof of the allegation of prior conviction in a case such as this. The Government does not at the outset know whether the defendant will or will not contest the fact of prior conviction. The decision below thus presents, we believe, a direct conflict with the

[6] Section 29 of the National Prohibition Act, 41 Stat. 316, read in pertinent part as follows:

"* * * It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. * * *"

cases arising under the Prohibition Act cited in footnote 4, *supra.*

2. Considered *de novo,* as a matter of principle it may be desirable that a procedure be established whereby evidence of a prior conviction would not be presented to the jury. But, in view of the long line of decisions holding that a defendant has a right to have a jury pass upon the question of second offense, it is imperative that the question be determined by an authoritative decision of this Court. In the present posture of the law, the Government is faced with a dilemma in prosecuting second offenders, not only under the Fair Labor Standards Act, but under the Federal Food, Drug, and Cosmetic Act as well, for Section 303 of the latter act (21 U. S. C. 333 (a)) also provides for increased punishment of second offenders without specifying the mode of procedure. If the Government fails to allege and prove the prior offense, then, under the cases heretofore cited, it runs the risk of being unable to invoke the penalty provided for a second offender. See *United States* v. *Berkowitz,* 45 F. Supp. 564 (W. D. Mo.), where the court refused to sentence the defendant as a second offender under the Fair Labor Standards Act because the prior conviction was not alleged in the information.[7] If it does allege and

[7] In a recent decision of the Fifth Circuit, *Cartwright* v. *United States,* 146 F. 2d 133, 135, that court said, in the course of a discussion of another problem, "Similarly, where a statute, such as the National Prohibition Act, Title 2, Sec. 29,

prove the prior offense, then, if the decision below is correct, no action by the trial judge in limiting the effect of such evidence can save the trial from error. In view of the fact that the Fair Labor Standards Act has been in effect for eight years and the Food and Drug Act for more than forty years, the problem of second offenders is obviously one of importance, and the procedure to be followed in such cases ought to be definitively established by this Court.

CONCLUSION

Since the procedure on the trial of second offenders required by the decision below is contrary to the rule recognized by this Court and adopted by other circuit courts of appeals, and since the question is one of general importance, we respectfully submit that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

MARCH 1947.

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27 U. S. C. A. § 46, provides for more severe punishment for subsequent offenses than for a first offense, the fact of the prior offense must be positively alleged and proved."

U. S. GOVERNMENT PRINTING OFFICE: 1947